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No. 85-1437 (4)

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

PATRICIA WILKINS,

Petitioner,

vs.

CHRISTOPHER SAYRES, RONALD LOVEJOY, JOSEPH ENGLEHARDT, EDDIE SANCHEZ, RICHARD BUCHOLTZ,

Respondents.

PATRICIA WILKINS,

Petitioner,

vs.

FREDERICK ROUSCH, ORRIE YNIQUEZ, WILLIAM COWHEY, WALTER JACKSON,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF FACTS

The Petitioner filed a Complaint in the District Court which alleged that on July 16, 1983, employees of an Alpha Beta Market in Anaheim, California telephoned the Anaheim Police Department. The Complaint alleged further that the Anaheim police officers detained and searched Petitioner without legal justification.

At the close of testimony, a discussion was held between the District Court Judge and all of the parties regarding the proposed jury instructions. The District Court Judge instructed the jury regarding the qualified immunity defense for the defendant police officers. The jury returned a general verdict in favor of all defendants - the police officers, Alpha Beta Markets, and the Alpha Beta employees.

I. IN HARLOW v. FITZGERALD, THIS COURT MERELY ELIMINATED THE SUBJECTIVE ELEMENT OF THE QUALIFIED IMMUNITY, WHILE RETAINING THE OBJECTIVE ELEMENT.

In Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed.2d 396 (1982), this Court initially reviewed the qualified or "good faith" immunity from personal liability for damages stemming from a violation of an individual's constitutional rights. The Harlow Court stated that previous decisions by this Court had established that the good faith defense had both an objective and subjective element. Id. at 815. The Harlow Court stated that the objective element dealt with whether an official "knew or reasonably should have known that the action he took within his sphere of official responsibility

would violate the constitutional rights of the plaintiff". Id. (Emphasis in original.) This Court also stated that the subjective element of the good faith defense involved whether an official "took the action with the malicious intention to cause a deprivation of the constitutional rights or other injury ..." Id. (Emphasis in original.)

The Harlow Court then went on to hold that the subjective element, dealing with the malicious intention of the official, should be eliminated. 457 U.S. at 817. This Court, therefore, held that government officials should be shielded from liability for civil damages for violations of constitutional rights if "their conduct does not violated clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818.

It is important to note that this Court merely eliminated the subjective element, characterized as a malicious intention to cause a deprivation of constitutional rights, but has left untouched the objective element. As was pointed out by Justice White in his concurring opinion in the case of Illinois v. Gates, this Court modified the qualified immunity by eliminating the subjective component of that defense. ____ U.S. ____, 76 L.Ed.2d 527, 567 (1983). Therefore, previous case law which has interpreted the objective element of the good faith defense is still valid.

The Ninth Circuit has recognized that although the subjective element of the good faith defense has been eliminated by this Court, the previous case law dealing with the objective element is still valid. In Fujiwara v. Clark, 703 F.2d 357 (9th Cir.

1983), the Court made note of the fact that in Harlow v. Fitzgerald this Court had eliminated the subjective element, based upon malice or bad motive, of the good faith defense. Id. at 359, Footnote 3. The Fujiwara Court stated that it need only consider the objective element of the good faith defense as a result of this Court's decision in Harlow v. Fitzgerald. The Fujiwara Court then went on to rely on cases which were decided prior to Harlow v. Fitzgerald and which analyzed the objective element of the good faith defense. Id. at 359-60. Thus, it is proper to utilize prior case law which deals with the objective element of the good faith defense.

II. THE DISTRICT COURT WAS CORRECT IN HAVING THE JURY DETERMINE THE THIRD PRONG OF THE PROCUNIER RULE, SO THAT THE JURY COULD DETERMINE IF THE POLICE OFFICERS HAD ESTABLISHED THE DEFENSE OF THE QUALIFIED IMMUNITY.

The objective element of the qualified immunity was explained by this Court in the case of Wood v. Strickland, 420 U.S. 306, 43 L.Ed.2d 214 (1975). In Wood, this Court held held that a government official is immune from liability unless the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [citizen] affected ..." Id. at 322. This Court elaborated on the qualified immunity

standard delineated in Wood v. Strickland, in the case of Procunier v. Navarette, 434 U.S. 555, 55 L.Ed.2d 24 (1977).

In Procunier, this Court broke down the Wood v. Strickland rule into three parts. The qualified immunity would not be available to a public official: (1) if the constitutional right allegedly infringed was clearly established at the time of the challenged conduct; (2) if the public official knew or should have known of that right; and (3) if the public official knew or should have known that his conduct violated the constitutional norm. 434 U.S. at 562.

The Ninth Circuit Court of Appeals, in the case of Fujiwara v. Clark, 703 F.2d 357 (9th Cir. 1983), has held that all three prongs of the Procunier tests must be considered in determining whether a public

official has established the qualified immunity. Id. at 359-60.

The Ninth Circuit has recently reaffirmed the holding in Fujiwara that all three prongs of the Procunier test must be considered in determining whether the defense of qualified immunity is available to a public official. In the case of Bilbrey By Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984), the Ninth Circuit was confronted with the issue of whether the qualified immunity defense was available to state officials who had conducted searches of high school students. Id. at 1463-64. After discussing the applicability of the first two prongs of the Procunier rule, the Brown Court addressed the issue of whether the qualified immunity was available even though it determined that the constitutional right was clearly established and that the public officials

knew or should have known of that right. Id. at 1466.

The Brown Court held that if public officials can show that they neither knew nor should have known that their conduct violated the constitutional norm, then the defense of qualified immunity is available. 738 F.2d at 1466-67. If a public official can prove that he neither knew or should have known that his conduct violated constitutional norms, then he has proved that there existed reasonable grounds for the belief that his actions were appropriate. The Brown Court, in the context of Fourth Amendment rights regarding search and seizure, stated this rule in the following way:

> "[even] if [public officials] should have been aware of . . . Fourth Amendment rights, it is not true that the immunity

> defense was unavailable to them as a matter of law . . . [public officials] could . . . qualify for immunity from damages if they reasonably, but mistakenly, believed that they had reasonable cause or probable cause to search Appellants."

738 F.2d at 1466-67.

In addition, the Brown Court held that although the first two prongs of the Procunier test might often best be decided by a trial judge, the third prong is a question of fact to be decided by the trier of fact. 738 F.2d at 1467. The Brown Court stated this holding, in the context of the facts of that case, in the following way:

> "and although the antecedent

> inquiry, whether legal rights have been settled, may often best be resolved by the trial judge . . . the existence of a reasonable believe that a search is lawful, viewed in light of the 'settled' nature of the law, is a question for the trier of fact."

Id. at 1467.

The District Court Judge correctly analyzed the approach to the qualified immunity for public officials in conformance with the holding of the Ninth Circuit in the Brown case. The District Court Judge instructed the jury that although she had determined that the law was clearly established at the time the police officers acted, the jury was to determine whether the

defendant police officers reasonably believed that their conduct comported with the settled law. Thus, the District Court correctly allowed the jury to determine the third prong of the Procunier rule in order to determine if the police officers had established the defense of qualified immunity.

III. CONCLUSION

For all of the reasons stated above, the respondents submit that certiorari should be denied.

DATED: May 6, 1986

Respectfully submitted,

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